(2)

No. 88-276

IN THE SUPREME COURT OF
UNITED STATES
OCTOBER TERM, 1988

WALTER R. GRIFFIN,

Petitioner,

v.

STATE OF NEW JERSEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF NEW JERSEY

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Larry R. Etzweiler
Attorney of Record

W. CARY EDWARDS
Attorney General of New Jersey
Hughes Justice Complex
Trenton, New Jersey 08625

Larry R. Etzweiler
Boris Moczula
Cherrie Madden Black
Deputy Attorneys General
New Jersey Division of Criminal Justice
Hughes Justice Complex, CN086
Trenton, New Jersey 08625
(609) 292-9086

Of Counsel and on the Brief

80pp

QUESTION PRESENTED

Whether this Court should decline discretionary review of the New Jersey Supreme Court's denial of certification to the Superior Court of New Jersey, Appellate Division, which affirmed a lower court's denial of petitioner's request for a trial by jury in his prosecution for second-offender operation of a motor vehicle while under the influence of intoxicating liquor, given that the maximum term of incarceration to which petitioner was exposed was only ninety days?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES:

Table of Authorities -- Continued

No. 88-276

IN THE SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM, 1988

WALTER R. GRIFFIN,

Petitioner,

v.

STATE OF NEW JERSEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE
OF NEW JERSEY

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

The respondent State of New Jersey respectfully requests that this Court deny the petition for writ of certiorari.

OPINIONS AND JUDGMENTS BELOW

At a bench trial in New Jersey

municipal court, petitioner was convicted of second-offender operation of a motor vehicle while under the influence of intoxicating liquor. (Petitioner's appendix at A-4). Petitioner's request for a jury trial was denied. (Petitioner's appendix at A-4). At a trial de novo before the New Jersey Superior Court, Law Division, petitioner was again convicted and his renewed request for a jury trial denied. (Petitioner's appendix at A-3). The New Jersey Superior Court, Appellate Division, ruled on the merits that petitioner was not entitled to a jury trial and thus affirmed petitioner's conviction on April 8, 1988. (Petitioner's appendix at A-2). The New Jersey Supreme Court denied his petition for certification on June 7, 1988. (Petitioner's appendix at A-1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The petition for a writ of certiorari has set forth the pertinent text of the New Jersey Statutes which are implicated in this case.

The text of the pertinent provisions of the United States Constitution is as follows:

> Art. III, Section 2, paragraph 3: "The trial of all Crimes, except in cases of Impeachment, shall be by jury; . . . "
>
> Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . "

REASONS WHY THE PETITION SHOULD BE DENIED

A. Petitioner Was Not Entitled to a Jury Trial in his Second-Offender Drunk Driving Prosecution, Given that the Maximum Term of Incarceration to Which Petitioner Was Exposed Was Only Ninety Days

A basic principle of law deeply rooted in the historical practice of the Colonies and the original states declares that, under the Constitution, no person is entitled to a trial by jury for a "petty" offense. Baldwin v. New York, 399 U.S. 66 (1970). This Court has developed, through a series of decisions emanating from Duncan v. Louisiana, 391 U.S. 145 (1968), a bright-line definition of "petty offense": an offense which is subject to a maximum term of incarceration of six months or less. Baldwin, supra; Frank v. United States, 395 U.S. 147 (1969); Codispoti v. Pennsylvania, 418 U.S. 506 (1974).

This Court recently dismissed for want of a substantial federal question an appeal involving an issue similar to that put forth by petitioner herein: whether prosecution for second-offender driving while intoxicated requires a trial by jury as that offense is defined in Louisiana. Bairnsfather v. Louisiana, ___ U.S. ___, 107 S.Ct. 1620 (1987), reh'g denied ___ U.S. ___, 107 S.Ct. 2204 (1987). Bairnsfather requested a jury trial in his prosecution for second-offender drunk driving, an offense mandating a thirty day to six month jail sentence and a $300 to $500 fine, in the Louisiana courts. Bairnsfather presented essentially the same arguments as petitioner in support of his contention that he was entitled to a jury trial. The thrust of those arguments was that certain collateral consequences attendant to a drunk driving

conviction elevate its status from "petty" to that of a "serious" offense requiring a jury trial under the Constitution. Landry v. Hoepfner, 840 F.2d 1201, 1210-1211 (5th Cir. 1988) (en banc).

"[B]y dismissing the appeal for want of a substantial federal question, the Supreme Court in Bairnsfather did reach and so resolve the substantive merits of the appeal . . . . Bairnsfather is thus a ruling on the merits with precedential value, albeit with less such value than an opinion of the Court after full briefing and argument." Landry v. Hoepfner, 840 F.2d at 1212. Petitioner, as a second-offender drunk driver in New Jersey, was subject to a custodial term of far lesser duration than the defendant in Bairnsfather, i.e., between two and ninety days, service of which could be

performed at an Intoxicated Driver's Resource Center. N.J. Stat. Ann. sec. 39:4-50(a)(2).[1] Yet petitioner has advanced no new arguments or legal authorities since the Bairnsfather appeal to warrant this Court's intervention in his case.

Petitioner's reference to this Court's June 20, 1988 grant of certiorari in Blanton v. North Las Vegas, Nevada, Docket No. 87-1437, involving a drunk driving jury trial issue, is not supportive of his cause. This Court's consideration of Blanton was precipitated by a split between federal and state judicial opinions in the same region on the issue. Compare United States v.

---

[1] Petitioner admits that his actual sentence in this respect was a suspended term of ninety days, except for two days which were to be served at the Intoxicated Driver's Resource Center. (Petition at 9).

Craner, 652 F.2d 23 (9th Cir. 1981) and Bronson v. Swinney, 648 F. Supp. 1094 (D. Nev. 1986) with Blanton v. North Las Vegas Municipal Court, 103 Nev. 135, 748 P.2d 494 (1987), cert. granted ___ U.S. ___, 108 S.Ct. 2843 (1988). Judicial friction of this nature is expressly recognized as a reason for the grant of review on certiorari. Rule 17.1(b) of the Rules of the United States Supreme Court. In contrast, here, as in Bairnsfather, there is no conflict between the state and federal judiciary emanating from the jury trial issue in petitioner's New Jersey prosecution. Neither the federal district courts of this State nor the Third Circuit is in conflict with the state courts. Consequently, this Court should decline to review petitioner's case.

In Landry, the Fifth Circuit, en banc, reversed a decision of one of its

panels, Landry v. Hoepfner, 818 F.2d 1169 (5th Cir. 1987) and held that the United States Constitution does not require the states to provide the right of trial by jury for a first offense DWI. Noting that the maximum penalty prescribed was six months' imprisonment and a five hundred dollar fine, the Fifth Circuit found that this "does not exceed that appropriate for 'petty' offenses under Baldwin v. New York . . . ." Landry, 840 F.2d at 1202.

Most importantly, the Fifth Circuit declared that this Court

> has never held or stated any crime is a "serious" rather than a "petty" offense on the basis of any criteria other than whether its maximum authorized confinement exceeded six months or whether it was indictable at common law. Otherwise put, the Court has never identified any particular offense as being nonpetty which was both not indictable at common law and carried a maximum authorized confinement of not more than six months." [Id. at 1209 (emphasis in original)].

Petitioner's contention that potential custodial punishment which is well under six months in jail, combined with various collateral consequences such as driver license revocation and increased insurance premiums, elevates drunk driving from an otherwise "petty" offense into a "serious" offense allowing a right to a jury trial, fails to present an important question of federal law as the law in this area has been settled by this Court's earlier opinions.

Further support for respondent's position that this Court should refuse to grant review of petitioner's case can be found in Frank, 395 U.S. at 148:

> In determining whether a particular offense can be classified as "petty", this Court has sought objective indications of the seriousness with which society regards the offense. . . . The most relevant indication . . . is the severity of the penalty authorized for its commission.

This Court also noted in Baldwin that "we have sought objective criteria . . . and we have found the most relevant such criteria in the severity of the maximum authorized penalty." Baldwin, 399 U.S. at 68. Petitioner seeks to establish a new order whereby courts apply subjective criteria, such as collateral consequences of a conviction, to determine the seriousness of an offense on an ad hoc basis. This analysis would produce judicial opinions driven by the personal predilections of the jurist authoring such an opinion. This Court's precedent counsels against such an approach.

In Landry, the Fifth Circuit emphasized that this Court has refined the determination of when an offense is "petty" or "serious," and therefore when a Constitutional right to a jury trial attaches: "Since Baldwin, the Court has spoken only in terms of the length of

possible confinement as establishing the dividing line between 'petty' and serious offenses." Landry, 840 F.2d at 1208. Petitioner's reliance on collateral consequences is misplaced and runs contrary to a long line of decisions by this Court holding that the determinative factor is the maximum authorized period of confinement. Id. at 1215-1216. Again, in Landry, the Fifth Circuit declared the following with reference to dismissal by this Court of the Bairnsfather appeal for want of a substantial federal question: "Clearly there is nothing in Bairnsfather which is in tension with or breaks new ground respecting Duncan, Frank, Baldwin, or Codispoti." Landry, 840 F.2d at 1212.

The New Jersey courts' treatment of the issue raised by petitioner's case strictly follows the principles delineated in the decisions of this

Court. See, e.g., State v. Owens, 54 N.J. 153, 254 A.2d 97 (1969), cert. denied 396 U.S. 1021 (1970); State v. Linnehan, 197 N.J. Super. 41, 484 A.2d 34 (App. Div. 1984), certif. den. 99 N.J. 236, 491 A.2d 723 (1985); State v. Zoppi, 196 N.J. Super. 596, 483 A.2d 844 (Law Div. 1984). Application of this Court's bright-line rule of six months' incarceration demonstrates the propriety of the decisions of the courts below and compels denial of the petition for a writ of certiorari.

B. Petitioner Should Be Seeking a Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division, Rather than to the Supreme Court of the State of New Jersey

Petitioner has filed a petition for a writ of certiorari to the Supreme Court of the State of New Jersey. However, that court has entered no judgment which

may be reversed. The Supreme Court of New Jersey has never ruled on the merits of petitioner's claim. Rather, it has only denied petitioner's petition for a writ of certification to the Superior Court of New Jersey, Appellate Division.

The Superior Court of New Jersey, Appellate Division, is the highest court of the State of New Jersey which has actually ruled on the merits of petitioner's claim. It is apparent that petitioner should be seeking a petition for a writ of certiorari to the Superior Court of New Jersey, Appellate Division, rather than to the Supreme Court of the State of New Jersey. Thus, the petition which petitioner has filed in this Court is incapable of providing him with the relief which he seeks. See, e.g., Faretta v. California, 422 U.S. 806, 812 (1975); Callender v. Florida, 383 U.S. 270 (1966).

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

W. CARY EDWARDS
Attorney General of New Jersey
Attorney for Respondent

By: Larry R. Etzweiler
Larry R. Etzweiler
Deputy Attorney General
Attorney of Record

Larry R. Etzweiler
Boris Moczula
Cherrie Madden Black
Deputy Attorneys General
New Jersey Division of Criminal Justice
Appellate Section

Of Counsel and on the Brief

DATED: October 19, 1988